Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Access Charge Reform	)	CC Docket No. 96-262
	)	
Complete Detariffing for Competitive	)	CC Docket No. 97-146
Access Providers and Competitive	)	
Local Exchange Carriers	)	

COMMENTS OF
WINSTAR COMMUNICATIONS, INC.

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Dated: July 12, 2000

SUMMARY

Mandatory detariffing of CLEC interstate access charges is not justified by evidence on the record in this proceeding. There is no evidence that the market has failed to constrain terminating access rates or that a large proportion of terminating access rates are excessive.

The negative effects of mandatory detariffing will far outweigh any possible positive effects. Detariffing will increase the regulatory burdens on both the Commission and CLECs. Mandatory detariffing will force CLECs to negotiate agreements with every IXC in order to ensure that they receive payment for their services. IXCs have a far more powerful bargaining position than CLECs and, in many cases, have the ability to force CLECs into unfair agreements. Mandatory detariffing may additionally create situations where calls are not completed if the Commission were to determine that IXCs have the right to refuse to complete calls with CLECs with whom they have not reached agreement. Mandatory detariffing would also create a substantial barrier to entry for new entrants. Accordingly, the Commission should not establish mandatory detariffing CLEC interstate access charges.

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Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers	)	CC Docket No. 97-146

COMMMENTS OF WINSTAR COMMUNICATIONS, INC.

Winstar Communications, Inc. ("Winstar") files these comments in response to the Public Notice inviting interested parties to refresh the records of the above-captioned proceedings regarding mandatory detariffing of interstate access charges for Competitive Access Providers ("CAP") and Competitive Local Exchange Carriers ("CLEC").[1] Winstar is a publicly-held company (traded on the NASDAQ) which, among other things, develops, markets, and delivers local telecommunications and broadband services in the United States. Through its operating affiliates, Winstar provides facilities-based local telecommunications services on a point-to-point and point-to-multi-point basis principally using wireless, digital millimeter wave capacity in the 38 gigahertz (GHz) band. Winstar has previously filed comments in this proceeding concerning

[1] *Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing of CLEC Interstate Access Services,* Public Notice, CC Docket Nos. 96-262 and 97-146, DA 00-1268, released June 16, 2000.

mandatory detariffing of CLEC interstate access charges.[2]

I. NONE OF THE SPECIFIC QUESTIONS IN THE PUBLIC NOTICE SUGGESTS A NEED FOR MANDATORY DETARIFFING OF CLEC INTERSTATE ACCESS CHARGES

A. Whether Mandatory Detariffing Addresses Any Market Failure to Constrain Terminating Access Rates

The Public Notice asks for comment concerning whether mandatory detariffing would have the effect of addressing "any market failure to constrain terminating access rates." The Public Notice fails to ask the more relevant question of whether there has been any such market failure. In fact, there is no basis in the record for concluding that there has been a market failure of any kind to address CLEC interstate access charges. The Commission has already determined that CLECs do not possess market power in providing terminating access,[3] and has determined that a CLEC's access charge is not unreasonable merely because it is higher than the Incumbent Local Exchange Carrier ("ILEC") charge. As stated in this proceeding by MCI, "there is no evidence in the record to demonstrate that unreasonably high CLEC access charges are ubiquitous or even widespread."[4]

The only solution to CLEC access charges that is required in this proceeding is for the Commission to promptly make it clear that IXCs are required to pay CLEC tariffed interstate access charges. The Commission should clarify that IXCs may not engage in unlawful "self-help" efforts such as refusing to pay tariffed CLEC interstate access charges or refusing to accept

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[2] Winstar has attached its previous comments filed in Docket No. 97-146 hereto as Attachment A.

[3] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, Report and Order, CC Docket Nos 96-262, 94-1, 91-213, and 95-72, 12 FCC Rcd 15982 (1997).

[4] MCI Comments in 96-262 at 18.

or complete calls from or to CLEC customers because of issues concerning CLEC interstate access charges. To the extent that an IXC views CLEC access charges as unreasonable, the appropriate remedy is for IXCs to avail themselves of the established complaint procedures under Sections 207 and 208 of the Act.

Moreover, for all the reasons discussed below, the sweeping and radical step of substituting negotiation for tariffed rates in setting CLEC interstate access charges is not a satisfactory solution to CLEC interstate access charges. Mandatory detariffing is a poor choice for addressing CLEC interstate access charges due to the burdens imposed on CLECs in negotiating access charges with hundreds of IXCs, the barriers to entry that this approach would create, the likely prospect that some negotiations will fail, the possibility that some IXCs will refuse to complete calls, the unequal bargaining power between CLECs and IXCs, and the resulting increased burdens on the Commission. In addition, if the Commission determines that some degree of additional action is necessary, the Commission should adopt solutions proposed by CLECs in this proceeding rather than mandatory detariffing.

B. Whether Detariffing Reduces the Administrative Burden On the Commission of Maintaining Tariffs

The Commission expends very little time administering the current program of permissive detariffing. Any efficiencies engendered by mandatory detariffing would be far outweighed by the administrative expense of dealing with the problems that would coincide with detariffing such as: the need to resolve pricing disputes between CLECs and IXCs; addressing complaints for damages against carriers by customers and between carriers when calls are not completed; and the consumer and congressional outcry that would arise if the Commission implements a market-based approach that permits IXCs to refuse to complete calls. Accordingly, mandatory detariffing would substantially increase, not decrease, the administrative burdens on the Commission.

C. Whether Mandatory Detariffing Provides a Market-Based Solution to Excessive Terminating Access Charges By Encouraging Parties to Negotiate Such Charges

Negotiation is an unacceptable method for setting CLEC interstate access charges for a number of reasons.

1. It is Infeasible for CLECs to Negotiate With Numerous IXCs

Winstar is not able as a practical matter to set its interstate access charges through negotiations with the many IXCs to which it currently provides access services. New CLECs, in particular, do not have the resources to engage in potentially extensive negotiations with many IXCs to set rates. Winstar stresses that because CLECs can receive calls from virtually any IXC, and because CLEC customers can use any IXC through dial around and casual calling, CLECs would need to reach agreements with virtually every IXC – several hundred - not just those to which they currently provide access services. Indeed, it is hard to imagine a more burdensome and inefficient way to set CLEC interstate access charges. Accordingly, the Commission should not establish mandatory detariffing because it would be infeasible for CLECs to negotiate interstate access charges with numerous IXCs.

2. Negotiation Is Inconsistent with the Statutory Scheme

In a detariffed environment, CLECs would continue to be subject to the nondiscrimination provisions of the Act. Winstar seriously questions whether it would be possible for CLECs to negotiate multiple contracts with numerous IXCs, with presumably different rates, for exactly the same service and comply with the nondiscrimination obligations of the Act. The Commission will have a heavy burden in explaining how a scheme of negotiation for setting CLEC interstate access charges is consistent with the Act.

3. IXCs Have Superior Bargaining Power

A negotiated approach to rate-setting will achieve satisfactory regulatory and marketplace results only if the negotiating parties have approximately equal bargaining power. Requiring parties of unequal bargaining power to set rates will lead to market distortions including below

cost pricing for some IXCs and services, over recovery from other categories of customers, and a weakened ability of some participants to compete effectively in the marketplace.

CLECs have no more than four percent of the local telecommunications marketplace measured by revenues.[5] CLECs cannot realistically compete for customers if they are unable to offer customers the ability to receive calls from the millions of customers of any of the major IXCs. On the other hand, it would far less problematic if AT&T were unable to offer its customers the ability to reach the far fewer customers of a CLEC. In an environment of mandatory detariffing in which CLECs must negotiate to set access charges, CLECs would have little choice but to agree to AT&T's price demands for access services. New CLECs would be particularly vulnerable to IXCs' demands.

AT&T has captured the situation very well:

> A CLEC confronted by an IXC customer of the CLEC's terminating access service who refuses to pay the CLEC's charges or abide by its other terms of service is placed in an untenable position. The CLEC must chose between expensive and problematic litigation with the IXC to enforce its terms under an implied contract theory (and thus accumulate higher uncollectibles), or attempt to suspend the delivery of interstate, interexchange calls placed by the IXC's end users.[6]

Accordingly, a negotiated approach to setting CLEC access charges issues is unsatisfactory because the major industry groups do not have equal bargaining power.

4. A Negotiated Approach Would Not be Competitively Neutral

As noted, CLECs in an environment of mandatory detariffing would be required to negotiate individually with several hundred IXCs. ILECs, on the other hand, are able to set rates by filing tariffs subject to review of the Commission, although it is appropriate that ILEC interstate access charges be fully regulated for as long as ILECs possess market power. It would be a significant advantage *vis a vis* CLECs that ILECs would not need to individually negotiate

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[5] *Local Competition: August 1999*, Common Carrier Bureau, Federal Communications Commission, p. 1.

[6] AT&T Comments, filed September 17, 1997, p. 4

hundreds of agreements with IXCs. Given that interstate access charges are a significant part of both CLEC and ILEC revenues, the establishment of such a radically different mechanism for establishment of CLEC access charges - individual negotiation and litigation with hundreds of IXCs - would seriously undermine the competitive position of CLECs.

AT&T has also captured the competitive disadvantage that CLECs would experience under mandatory detariffing:

> Because ILECs will continue to exercise market power over access services for the foreseeable future, the Commission properly requires them to file tariffs for their access services. However, the existence of such tariffs means that the ILECs need not incur any costs to created switched access arrangements with any IXCs; rather they can rely on their tariffs to establish a clear, binding obligations on IXCs to pay access charges. The disadvantage faced by CLECs who are denied the option of filing tariffs is substantially compounded by the costs of and risks attributable to litigation with recalcitrant access customers concerning their obligation to comply with their access terms. The Commission should be especially reluctant to adopt any proposal that would provide the entrenched incumbents with an additional cost advantage over new entrants.[7]

Accordingly, negotiation is not a suitable approach to setting CLEC interstate access charges because it would not be competitively neutral.

5. Detariffing Would Establish a Barrier to Entry

Under mandatory detariffing, a CLEC could not initiate service until it had reached agreement with hundreds of IXCs. CLECs would be faced with the choice of either providing service for free, or, delaying service until it has reached an agreement with vast number of IXCs from whom its customers might receive interexchange service. Moreover, new market entrants with virtually no customers would have even less bargaining power than existing CLECs. For the same reasons that it is not feasible for CLECs to set interstate access charges through

[7] AT&T Comments in CC Docket 97-146 (filed September 17, 1997) at p.6-7.

negotiation, requiring CLECs to do so before offering service would establish a formidable barrier to entry.[8]

6. Negotiation Carries the Risk of IXCs Refusing to Complete Calls

A market-based approach that genuinely relies on CLEC/IXC negotiations to set CLEC interstate access charges involves the possibility that negotiations will fail and that IXCs could choose to refuse to complete calls to, or from, customers of a CLEC with whom it has not reached agreement. Indeed, AT&T has already threatened to do so.[9]

However, any "market-based" approach that involves the possibility of uncompleted calls is unacceptable for that reason alone. Indeed, it would radically transform the national telecommunications framework for the worse for the Commission to abandon the universal connectivity of the nationwide telephone network by permitting IXCs to refuse to complete calls. Accordingly, negotiation is not a viable option for determining CLEC interstate access charges insofar as it would entail the possibility of IXCs refusing to complete calls.

7. Negotiation Would Frustrate Consumers Ability to Choose IXCs

Consumers may now choose their IXC with little inconvenience or delay. The Commission, over the years, has conducted extensive proceedings to assure that consumers have "equal access" to long distance carriers. In an environment in which CLECs and IXCs must negotiate access arrangements, however, consumers would potentially be precluded from choosing an IXC until an agreement between the IXC and CLEC had been achieved. Either the CLEC or the IXC could refuse to permit the customer's choice until that time. This would be an unacceptable result for consumers seeking to change long distance carriers. Alternatively, if consumers may switch long distance carriers prior to a contract, some IXCs will choose to

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[8] This would also constitute a barrier to entry for new IXCs since they would be required to negotiate with hundreds of CLEC before they could realistically offer their customers the ability to successfully terminate calls.

[9] *Common Carrier Bureau Seeks Comment on the Requests for Emergency Temporary Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance Enjoining AT&T Corp. From Discontinuing Service Pending Final Decision,* Public Notice, CC Docket No. 96-262, released May 15, 2000.

receive access services without paying for them. This is essentially the *status quo* in many respects, *i.e.* AT&T and other IXCs continue to solicit CLEC customers to presubscribe to their interexchange services but refuse to pay for access services received. While this does not frustrate consumers, it is unacceptable to CLECs because they are not being paid for services they provide to IXCs.

For all these reasons, therefore, a negotiated approach to setting CLEC interstate access charges is totally infeasible and unwise. Insofar as any solution to CLEC interstate access charges is required, other than making the IXCs that refuse to pay tariffed charges do so, the Commission should seek other solutions along the lines that CLECs have suggested in this proceeding.

D. Whether Mandatory Detariffing Provides the Same Benefits Identified in the *Hyperion Order and NPRM* for Permissive Detariffing

The Public Notice asks for comments on whether mandatory detariffing would provide additional public interest benefits beyond those achieved through permissive detariffing. Specifically, the Commission inquires whether the mandatory detariffing of CLECs would achieve the benefits discussed within the Hyperion Order and NPRM[10] such as: the reduction of transaction costs for providers; reduction of administrative burdens for service providers; permitting rapid response to market conditions by costs on carriers that attempt to make new offerings; and facilitating entry by new providers. These benefits would not result from the mandatory detariffing of CLECs. As explained in these comments, detariffing would have the opposite effect of increasing the applicable costs and burdens for new entrants while reducing competition.

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[10] *Hyperion Telecommunications, Inc. and Time Warner Petitions for Forbearance Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers,*

E. Whether Permissive Detariffing Precludes Use of the Filed Rate Doctrine to Nullify Customer

Obviously, in an environment of mandatory detariffing, the filed rate doctrine would play no role because CLECs would not be filing tariffs.[11] The more important issue is whether the filed rate doctrine should be given any significant weight in evaluating whether to establish mandatory detariffing. In this connection, there is no evidence in the record to warrant a conclusion that CLECs have, or are able to, wield the filed rate doctrine to nullify contracts with IXCs. AT&T contends that the filed rate doctrine is simply not a concern with respect to CLECs.[12] Moreover, throughout this proceeding, IXCs have opposed mandatory detariffing. If CLECs were able to abuse the filed rate doctrine with respect to their IXC customers, there would be some record evidence to that effect and, presumably, IXCs would support mandatory detariffing. In contrast, customers of IXCs supported detariffing of interexchange services because of concern about the filed rate doctrine. Accordingly, the Commission's concern that CLECs would use the filed rate doctrine to nullify contracts is totally misplaced and is not a benefit that could justify mandatory detariffing.

F. Whether Mandatory Detariffing Would Reduce the Economic Burdens on non-ILECs of Filing Tariffs

As discussed, the time and expense of negotiating with multiple IXCs would vastly exceed any savings that would be involved in not having to file tariffs. Winstar is certain that

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Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Docket No. 97-142, 12 FCC Rcd 8596 (1997).

[11] The "filed rate doctrine" prohibits a regulated entity from charging rates "for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall,* 453 US 571, 577(1981). As the Supreme Court has noted, the doctrine creates "strict filed rates requirements and... forbid[s] equitable defenses to collection of the filed tariff." *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 US 116, 127 (1990). Simply put, a tariff filed with the FCC supersedes all other agreements between the parties. *MCI Telecom Corp. v. Best Tel. Co.*, 898 F. Supp. 868, 872 (D.S.D. Fla. 1994). Indeed, "filed tariffs are the law, not mere contracts." *MCI Telecommunications Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992). Nondiscriminatory rate setting is one of the basic rationales for the doctrine. *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 21 (2d Cir. 1994).

[12] AT&T Comments filed September 17, 2000, p. 8.

the increased burdens and other disadvantages of negotiating access charges would far outweigh any benefits of mandatory detariffing. Other CLECs will reach the same conclusion. Acccordingly, there is no basis in the record for concluding that mandatory detariffing would be desirable on the basis of reduced administrative burdens on CLECs.

II. DETARIFFING IS PREMATURE FOR THE LOCAL EXCHANGE MARKET

The proposal to set CLEC interstate access charges through a market-based approach of negotiation, rather than tariffing, is premature. We note that the Public Notice in this proceeding references the fact that the FCC's IXC Detariffing Order has recently become effective and that the Commission is inviting comments "in light of the court ruling". We further note that, as a general matter, the competitive structure of the interexchange market is very different than that of the local exchange market. The interexchange market is comprised of carriers all of whom are non-dominant. In contrast, each local exchange market is comprised of one dominant carrier that possesses nearly 95% of the market in terms of revenues[13] and several nescient entrants. The local exchange market is still in the transition process, whereas the interexchange market has already achieved a certain level of competition.

This different structure of the local exchange makes the proposal to use CLEC/IXC negotiations as the way to set CLEC interstate access charges premature for two main reasons. First, as discussed below, detariffing will create a significant competitive disadvantage and constitute a barrier to entry for CLECs. The Commission should refrain from mandatory detariffing until the local exchange market is competitive or, at least, until detariffing can be applied to all LECs, including ILECs. Applying detariffing only to new entrants will hinder their ability to compete. Secondly, BOCs are gaining authority to offer in-region long distance service

[13] *Local Competition: August 1999,* Common Carrier Bureau, Federal Communications Commission, p.1.

which means that under the envisioned market-based approach CLECs will be required to negotiate their access charges with the dominant providers in the market. In that environment, BOCs will have a heightened incentive and ability to harm CLECs. For example, ILECs have the ability to refuse to reach an agreement with a CLEC for an unreasonable period of time. This action would effectively prevent a CLEC from initiating service if it is a new entrant, or if it is an existing CLEC, from offering its customers the ability to use the BOC's long distance services. In addition, the Commission will be unable to effectively police the myriad ways that ILECs could seek to disadvantage to CLECs through negotiations over CLEC access charges.

For these reasons, it is premature to establish mandatory detariffing for CLECs. The Commission should not further consider mandatory detariffing until the local exchange market is fully competitive and detariffing could be applied across the industry.

III. ANY MANDATORY DETARIFFING MUST BE PART OF A COMPREHENSIVE SOLUTION OF ISSUES CONCERNING CLEC

For all the reasons discussed above, the Commission should not establish mandatory detariffing of CLEC interstate access services. However, if the Commission nonetheless chooses to do so to any extent, it should only do so as part of a "package deal" that will comprehensively address current issues concerning CLEC interstate access charges. These include issues raised in the *CLEC Access Charge NPRM*,[14] and the circumstance, if any, when IXCs may decline to purchase CLEC access services. Detariffing would not resolve any issues currently before the Commission concerning CLEC interstate access charges and the Commission would be compelled to resolve them (possibly on an emergency basis) through complaints and responses to termination of consumer services. Accordingly, the Commission

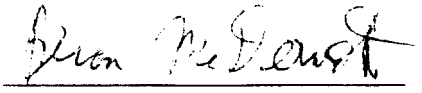
[14] *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262,FCC 99-206, released August 27, 1999 ("*NPRM*" or "*Pricing Flexibility Order*").

should only consider adoption of mandatory detariffing as part of a larger decision addressing CLEC interstate access charges issues pending in this proceeding. Winstar urges the Commission to adopt the proposals made by the Association for Local Telecommunications Services and CLECs.

CONCLUSION

For these reasons, the Commission should not establish mandatory detariffing of CLEC interstate access charges. To the extent any solution to CLEC interstate access charges is required, the Commission should adopt approaches that have been suggested by CLECs.

Respectfully submitted



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Attachment A

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ATTORNEY-AT-LAW

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August 18, 1997

VIA COURIER

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RECEIVED
AUG 18 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Hyperion Telecommunications, Inc.'s Petition Requesting Forbearance (CCB/CPD No. 96-3, CCB/CPD No. 96-7, CC Docket No. 97-146)

Dear Mr. Caton:

On behalf of WinStar Communications, Inc., this letter shall serve as its Comments in response to the Commission's June 19, 1997 Notice of Proposed Rulemaking in the above proceeding.

On May 23, 1996, WinStar filed Comments in CCB/CPD No. 96-3 supporting permissive detariffing for Competitive Access Providers and opposing mandatory detariffing. WinStar incorporates these Comments herein by reference in opposition to the Commission's instant rulemaking proposal. A copy of these Comments are attached.

An original and 12 copies of this filing and WinStar's May 23, 1996 Comments are enclosed. Please date stamp the extra copy of this letter and return it to the undersigned via my courier.

If you should have any questions, please do not hesitate to contact me.

Very truly yours,

Morton J. Posner

Counsel for WinStar Communications, Inc.

Enclosures
cc(w/encl.): Service List
Competitive Pricing Division (2 copies)
ITS
Timothy Graham
Robert G. Berger, Esq.

No. of Copies rec'd 0+12
List ABCDE

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ATTORNEY-AT-LAW

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STAMP AND RETURN

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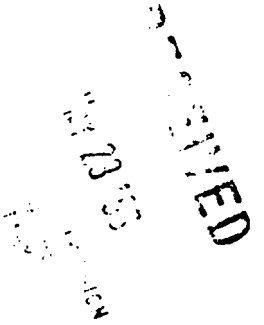
May 23, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554



Re: Petition of Hyperion Telecommunications, Inc. for Forbearance From Tariff Filing Requirements for Competitive Access Providers, DA 96-462

Dear Mr. Caton:

Transmitted herewith on behalf of WinStar Communications, Inc., are an original and six (6) copies of its Comments in the above-referenced proceeding.

Also enclosed is an extra copy of this letter and Comments. Please date-stamp the extra copy and return it to me in the envelope provided.

If there are any questions concerning this matter, please contact me.

Very truly yours,

Morton J. Posner

Enclosures

cc (w/o encl.): Andrew D. Lipman, Esq.

cc (w/encl.): Chief, Tariff Division (2 copies by hand)
ITS (1 copy by hand)
Timothy R. Graham
Robert G. Berger
Joseph M. Sandri, Jr.

161086.1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Hyperion Telecommunications, Inc. for Forbearance from Tariff Filing Requirements for Competitive Access Providers	)	DA 96-462

COMMENTS OF WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"), by its undersigned counsel, hereby submits its Comments in response to the Petition of Hyperion Telecommunications, Inc. for Forbearance from Tariff Filing Requirements for Competitive Access Providers ("CAPs").[1/] WinStar supports Hyperion's petition and urges the Commission to adopt a policy of permissive tariffing for CAPs.

I. INTRODUCTION

The Commission recently sought comment in a *Notice of Proposed Rulemaking* on its proposal to require mandatory forbearance from tariff filing requirements for non-dominant interexchange carriers ("IXCs").[2/] WinStar filed comments in that proceeding supporting a policy

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1/ WinStar is a publicly-held company whose stock is traded on the NASDAQ market system. The Company provides local telecommunications services on a point-to-point basis using wireless, digital millimeter wave capacity in the 38 GHz band, a configuration referred to by WinStar as Wireless Fiber℠. The Company's local telecommunications services are offered in 43 of the nation's largest metropolitan statistical areas. WinStar has received authority to operate as a competitive access provider in 22 states and has applications pending in a number of other states. WinStar has also been approved to offer competitive local exchange services in nine states, with applications pending in four other states.

2/ *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, FCC 96-123 (released Mar. 25, 1996) ("Forbearance Rulemaking").

of voluntary compliance with tariff filing requirements or "permissive tariffing."[3/] Permissive tariffing would enable carriers to determine, based upon their customers, and market conditions, whether to file tariffs and, if tariffs are filed, the information contained therein. While the policy considerations underlying tariff forbearance for CAPs and non-dominant IXCs are slightly different, WinStar supports a similar permissive tariffing regime and incorporates its comments from the Forbearance Rulemaking herein. Specifically, WinStar believes permissive tariffing for CAPs is warranted because:

- The sophisticated parties, primarily business and governmental users as well as other carriers, who use CAP service, and the nature of that service, do not require full-blown tariffs to ensure against monopoly or anticompetitive pricing.
- A permissive tariffing policy would allow CAPs to develop a more efficient means of contracting with customers.
- Complete elimination of tariff filings is not authorized by the Telecommunications Act of 1996, is not in the public interest, and is premature.

I. A MANDATORY TARIFF REGIME IS UNNECESSARY FOR NON-DOMINANT COMPETITIVE ACCESS PROVIDERS

Section 10(a) of the Telecommunications Act of 1996[4/] states that the Commission "shall forbear from applying any regulation or provision" of the Communications Act of 1934 (including the tariff filing requirements set forth in Section 203 of the Communications Act) if the Commission determines: (i) enforcement is not necessary to ensure that common carrier practices are not unjust and unreasonably discriminatory; (ii) it is not necessary for the protection of consumers; and (iii) forbearance is consistent with the public interest. Given the type of

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3/ *See Comments of WinStar Communications, Inc.*, CC Docket No. 96-61 (April 25, 1996).

4/ Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996) ("1996 Act").

customers who demand CAP service, WinStar submits that under this statutory test elimination of mandatory tariff filings is warranted.

Competitive access providers such as WinStar provide dedicated services to sophisticated business customers (or other carriers) who are aware that there are many alternative providers and who execute individual service contracts with a CAP. CAPs offer this service in direct competition primarily with incumbent local exchange carriers ("ILECs") who dominate the market.

Since CAP service is provided either to sophisticated high volume business customers or to other carriers, tariffs do not serve the consumer protection role that normally is associated with interexchange or other telecommunications services alone. New entrants like WinStar do not have sufficient market power to warrant tariff filings to prevent the monopoly or anticompetitive pricing of their services. WinStar does suggest, however, that the Commission continue to require dominant ILECs, who can exert market power in the absence of competition, to offer local access services pursuant to tariff.

II. PERMISSIVE TARIFFING WOULD OFFER PUBLIC INTEREST BENEFITS.

Unlike interexchange service, which is offered to a mass market, CAP service is utilized by a relatively narrow base of customers. However, as non-dominant CAPs grow and expand the geographic scope of their service offerings, tariffs may provide a more efficient mechanism for dealing with a variety of customers by instituting standard contract provisions. Tariffs are a rapid and efficient way for a carrier to adjust services and prices for all present and potential switched access customers at the same time. Tariffs also would enable CAPs to initiate new products and

services quickly without marketing and negotiating individually with customers. By allowing carriers voluntarily to comply with tariff filing requirements, carriers will be able to mix tariff and contract methods to capture the efficiencies of each. Through experimentation, carriers will discover what minimum tariff information the public interest requires. Permissive tariffing would substantially reduce administrative burdens on both the Commission and carriers. Elimination of the cost of filing full blown tariffs would benefit customers in the form of lower prices for service.

III. COMPLETE ELIMINATION OF TARIFF FILINGS IS NOT AUTHORIZED BY THE 1996 ACT, NOT IN THE PUBLIC INTEREST, AND IS PREMATURE

WinStar respectfully suggests that mandatory detariffing currently is not in the public interest, the Commission must not *require* CAPs to withdraw their tariffs. As WinStar argued in its Comments in the IXC docket, the 1996 Act does not mandate elimination of all tariff filing requirements.[5/] Rather, the 1996 Act only authorizes forbearance consistent with the public interest. Tariffs continue to protect carriers, consumers, and competition alike. In the absence of tariffs, the introduction of varied services and price changes might have to be renegotiated with all customers. It would be impossible to respond quickly to market changes. If CAPs were required to cancel their tariffs, those individual customer service contracts which rely upon tariff language would be eviscerated. There would be uncertainty about what terms and prices govern service without the referenced tariffs, and the possibility that CAPs would be unable to collect from customers as a result. The Commission's complaint procedures would be rendered all the more difficult without the proof that tariffs can provide. Moreover, a mandatory detariffing

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5/ *See Comments of WinStar Communications, Inc.*, CC Docket No. 96-61, at 3-4.

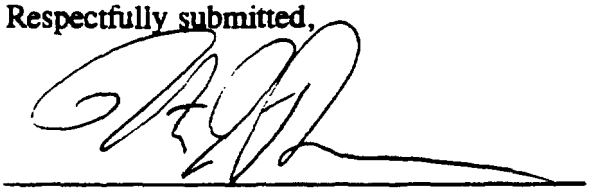
policy would be premature until full local competition exists and the Commission has the benefit of experience in the interaction between the 1996 Act and competition in the local marketplace. Until such time as the Commission, the industry, and consumers gain that experience, a permissive tariffing regime would best serve the public interest.

IV. CONCLUSION

WinStar agrees with the underlying thesis of Hyperion's petition: mandatory tariff filings are no longer necessary for non-dominant CAPs. The public interest is served by a policy of permissive tariffing, which affords carriers the benefits of filing tariffs with the flexibility to tailor an efficient method of contracting with customers. Competition requires, however, that ILECs continue to file tariffs for their CAP service so that the Commission and the industry can monitor instances of anticompetitive ILEC conduct. Complete detariffing of non-dominant CAP service is neither authorized by the 1996 Act nor beneficial to customers, carriers, or the Commission.

Accordingly, WinStar submits that Hyperion's petition should be granted to the extent that the Commission allows permissive tariffing for non-dominant CAPs.

Respectfully submitted,



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